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Miguel Schor

Suffolk University Law School

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An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia

MIGUEL SCHOR*

ABSTRACT

This essay explores the emergence of the Mexican Supreme Court and the Colombian Constitutional Court as powerful political actors. Mexico and Colombia undertook constitutional transformations designed to empower their respective national high courts in the 1990s to facilitate a democratic transition. These constitutional transformations opened up political space for the Mexican Supreme Court and the Colombian Constitutional Court to begin to displace political actors in the tasks of constitutional construction and maintenance.

These two courts play different roles, however, in their respective democratic orders. Mexico chose to empower its Supreme Court to police vertical and horizontal separation of powers whereas Colombia fashioned a Constitutional Court whose task is to deepen the social bases of democracy by constructing rights. This essay argues that the constitutional changes that occurred are a necessary but not sufficient explanation for the role these two courts play. The agenda courts undertake is shaped both by short-term political bargains and by long-term societal transformations. As a result of both the bargains that led to the adoption of a new constitution and broader intellectual transformations regarding the role of courts in effectuating constitutional guarantees, the Colombian Constitutional Court has pursued a more ambitious agenda than the Mexican Supreme Court.

*Associate Professor of Law, Suffolk University Law School. I would like to thank Adeno Addis, Larry Catá Backer, Daniel Brinks, Hannah Buxbaum, Joel Colón-Ríos, Javier A. Couso, Brannon P. Denning, Julio Faundez, Tom Ginsburg, David Landau, Kim Lane Scheppele, and Mark Tushnet for their encouragement, comments, and suggestions. I would also like to thank the participants at the AALS Conference on Constitutional Law, Cleveland, Ohio, June 3–6, 2008; the Law and Society Conference, Montreal, Canada, May 29–31, 2008; and the *Indiana Journal of Global Legal Studies* Symposium on Operationalizing Global Governance, Bloomington, Indiana, March 19–21, 2008, for their comments and suggestions.

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INTRODUCTION

This essay is part of a larger study that examines the role courts play in constitutional construction and maintenance. The story of constitutionalism is being written primarily in the developing world. While it is premature to speak of the triumph of democracy around the world,¹ the late twentieth century witnessed a remarkable expansion of democracy and constitutionalism around the globe. Our intellectual maps of constitutionalism, however, marginalize the experience of the developing world because scholars believe that new democracies should copy the best practices of consolidated or well-established democracies.² The problem with this view is that it obscures the processes by which constitutionalism is constructed. Scholars should stop viewing new democracies and their travails through the lens of the institutions of well-established democracies. We need to reverse the paradigm embedded in the dominant scholarly discourse by moving the experience of new democracies to the center of our study of constitutions.³ We need, in short, new and better stories about constitutionalism that emphasize the experience of the developing world.

No region of the world provides empirically richer material for the study of constitutional success and failure than Latin America.⁴ The history of the region, from independence until the 1980s, is littered with attempts to make republican government work that resulted in oligarchy and dictatorship.⁵ The last few decades of the twentieth century, however, were clearly a period of democratic renewal in Latin America as electoral democracy became the norm. The late twentieth century was also a period of intense constitutional experimentation, with the discussion of

1. Larry Diamond, *The Democratic Rollback*, FOREIGN AFF., Mar./Apr. 2008, at 36, 36.

2. Democracies become consolidated when citizens come to believe it is the "only game in town." ADAM PRZEWORKSI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 26 (1991).

3. This argument is developed at greater length in Miguel Schor, *Rule of Law*, in 3 ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 1329 (David S. Clark ed., 2007).

4. The republics of the region experimented with more than one hundred constitutions in the nineteenth century alone. BRIAN LOVEMAN, THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA 370 (1993). While political instability waned in the twentieth century, political turmoil and constitutional turnover remained a problem. PETER H. SMITH, DEMOCRACY IN LATIN AMERICA: POLITICAL CHANGE IN COMPARATIVE PERSPECTIVE 19–43 (2005). The most recent bout of constitution-making is tied to the renewal of democracy in the 1980s. See *infra* note 64 and accompanying text.

5. The theoretical debate over the path of constitutionalism in Latin America is critically assessed in Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 14–19 (2006).

major reforms aimed at curbing the power of presidents,⁶ decentralizing power,⁷ and empowering courts to vigorously construe constitutions.⁸

The judicial reforms undertaken in this region are part of a worldwide trend as courts around the globe gained power at the expense of elected officials. Scholars vigorously debate the implications of the global expansion of judicial power.⁹ Judicial optimists celebrate it while judicial pessimists decry it. Judicial optimists draw on the experience of polities that made a successful transition to democracy, such as South Africa and Germany, to argue that judicial review has an important democratic pay-off by strengthening constitutions.¹⁰ Judicial pessimists, on the other hand, draw on the experience of older, consolidated democracies, such as the United States, to argue that empowering courts weakens citizen attachment to constitutions and undermines the ability of legislatures to solve pressing problems.¹¹ This essay argues that students of courts have paid too much attention to successful democracies in building theoretical models and too little to the less successful ones.¹² More attention needs to be paid to the role of courts in the troubled or partial democracies that are the norm in much of the developing world,¹³

6. SMITH, *supra* note 4, at 154.

7. See generally MERILEE S. GRINDLE, AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA (2000) (examining the attempts at institutional reforms in several Latin American countries).

8. See generally EN BUSCA DE UNA JUSTICIA DISTINTA: EXPERIENCIAS DE REFORMA EN AMÉRICA LATINA (Luis Pábara ed., 2004); Julio Faundez, *Democratization Through Law: Perspectives from Latin America*, in ON THE STATE OF DEMOCRACY 125 (Julio Faundez ed., 2007); LINN A. HAMMERGREN, THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE (1998); THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Seider et al. eds., 2005); Ángel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT'L L.J. 185 (2008).

9. See Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 270–75 (2008), for a critical review of the debate.

10. See, e.g., HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (2000); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

11. See, e.g., RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

12. For an important study examining judicial review in developing democracies, see TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

13. See generally Larry Diamond, *Thinking About Hybrid Regimes*, J. DEM., Apr. 2002, at 21 (criticizing the current classification of political structure).

including Latin America.¹⁴ It is in new democracies, after all, that scholars can observe the birth of institutions such as constitutional courts.

This essay explores the emergence of the Mexican Supreme Court and the Colombian Constitutional Court as powerful political actors. Mexico and Colombia are both troubled democracies in a region where courts have historically been marginalized from political disputes. Both nations undertook constitutional transformations designed to empower their respective national high courts in the 1990s to facilitate a democratic transition. These constitutional transformations opened up political space for the Mexican Supreme Court and the Colombian Constitutional Court to begin to displace political actors in the tasks of constitutional construction and constitutional maintenance. Both courts have undoubtedly been transformed into institutions with a sense of mission by vigorously construing their new constitutional powers.

These two courts play different roles, however, in their respective democratic orders. Mexico chose to empower its Supreme Court to police vertical and horizontal separation of powers, whereas Colombia fashioned a Constitutional Court whose task is to deepen the social bases of democracy by constructing rights. This essay argues that the constitutional changes that occurred are a necessary but not sufficient explanation for the role these two courts play. The agenda courts undertake is shaped both by short-term political bargains *and* by long-term societal transformations.¹⁵ As a result of both the bargains that led to the adoption of a new constitution and broader intellectual transformations regarding the role of courts in effectuating constitutional guarantees, the Colombian Constitutional Court has pursued a more ambitious agenda than the Mexican Supreme Court.

In addition to exploring why these transformations occurred, this essay examines their democratic pay-off and makes two conclusions. First, although judicial activism has become a normative and political bone of contention in the United States,¹⁶ critiques of judicial activism have less bite in the context of developing countries. Activist courts, such as the Colombian Constitutional Court, can play a key role in ushering in needed democratic transformations in transitional democracies.¹⁷

14. SMITH, *supra* note 4, at 342 (concluding that “present-day democracy in Latin America tends to be shallow”).

15. For an analogous argument, see CHARLES R. EPP, *THE RIGHTS REVOLUTION* (1998).

16. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

17. Kim Lane Scheppele, *Democracy by Judiciary: Or, Why Courts Can be More Democratic than Parliaments*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 25 (Adam W. Czarnota et al. eds., 2005). See generally MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL*

In a region, such as Latin America, where constitutions have long been marginalized from regulating political conflict,¹⁸ a judiciary jealous of maintaining its position vis-à-vis other actors in constitutional construction is a promising change.

Second, this essay challenges the externalist analysis that scholars employ in analyzing the judicialization of politics¹⁹ and contributes to the nascent literature on the emergence of balancing tests²⁰ by placing Mexico and Colombia in the broad stream of global constitutionalism. Scholars of judicial politics emphasize why politics choose to empower courts. This essay argues that we need to understand not only the conditions under which constitutional courts emerge, but also how courts are transformed by the role they play in a democratic order.²¹ Courts whose agenda includes a broad mandate to effectuate rights are likely to employ balancing tests, whereas courts that primarily effectuate separation of powers are more likely to utilize legal formalism. Legal formalism allows courts to hide legal innovation under the guise of constitutional interpretation. The shift from formalism to balancing marks a key transition in the emergence of courts as self-confident actors that do not mask the creative role they play in constitutional maintenance.

I. A NEW UMPIRE IN MEXICAN POLITICS

The role played by the Mexican Supreme Court has its roots in Mexico's past. Mexico's ruling party, the Partido Revolucionario Institucional (PRI), governed for almost a century with remarkably little violence. It was, as the Peruvian novelist Mario Vargas Llosa once remarked, the "perfect dictatorship." Mexico's political order under the PRI blended authoritarianism with flexibility because some constitutional rules, like the prohibition on presidential re-election, were respected, allow-

WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 227–64 (2008) (discussing weak form judicial review as a method for enforcing social and economic rights).

18. The causes and implications of the marginalization of constitutions in Latin America are examined in Schor, *supra* note 5, at 14–30.

19. See, e.g., THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

20. See, e.g., Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, (Yale Law Sch. Faculty Scholarship Series, Paper No. 14, 2008), available at <http://lsr.nellco.org/yale/fss/papers/14>; see *infra* notes 97–121 and accompanying text.

21. For a richly suggestive essay on this point, see Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473 (2003).

ing the system to evolve over time. The flexibility of Mexican authoritarianism made Mexico the most successful dictatorship of the twentieth century.²²

Authoritarianism has been a problem in Latin America since independence,²³ as institutions failed to constrain presidents throughout the region.²⁴ Institutional design was not the culprit in Mexico, as its 1917 Constitution established a reasonable balance of powers between the different branches of government. The strong powers wielded by Mexican presidents flowed not from their formal powers, but from their control over the PRI, which, in turn, controlled every level of government until late in the twentieth century.²⁵ The “metaconstitutional powers of the president” trumped the formal separation of powers guaranteed by Article 49 of the Mexican Constitution of 1917.²⁶ The reason this matters is that when Mexico democratized and political parties opposed to the PRI gained office, vertical and horizontal separation of powers emerged quickly. The institutions by which different political factions check each other had not been destroyed during the period of PRI ascendancy, but had simply lain dormant until pricked into activity by the emergence of political competition.

The long period of PRI ascendancy did put its stamp, however, on the Mexican Supreme Court.²⁷ Although it enjoyed formal independence from the executive,²⁸ the Mexican Supreme Court was subservient to the president throughout the period of

22. See STEPHEN D. MORRIS, *POLITICAL REFORMISM IN MEXICO: AN OVERVIEW OF CONTEMPORARY MEXICAN POLITICS* 190 (1995), for discussion about Mexico's authoritarian exceptionalism. The openness of the PRI regime led Robert Dahl, perhaps the most famous student of democracy, to mistakenly conclude that Mexico under the PRI was democratic, or in Dahl's terminology, polyarchic. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 74 (1956).

23. Scholars disagree whether the nations of the region are authoritarian with façade constitutions or whether they are liberal projects gone awry. Compare CLAUDIO VÉLIZ, *THE CENTRALIST TRADITION OF LATIN AMERICA* 3–5 (1980) (arguing that the disposition of Latin American countries facilitates dictatorship), with Jeremy Adelman & Miguel Angel Centeno, *Between Liberalism and Neoliberalism: Law's Dilemma in Latin America*, in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW ORTHODOXY* 139, 158–59 (Yves Dezalay & Bryant G. Garth eds., 2002) (arguing that the implementation failed, and that respect for law is unlikely to take hold in Latin America anytime soon).

24. See generally Guillermo O'Donnell, *Delegative Democracy*, J. DEM., Jan. 1994, at 55 (finding that the authoritarian past of new Latin American democracies reinforces behavior that keeps them from being true representative democracies).

25. Jeffrey Weldon, *The Political Sources of Presidencialismo in Mexico*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 225, 252–53 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997).

26. *Id.* at 254–55.

27. See MIGUEL GONZÁLEZ COMPEÁN & PETER BAUER, *JURISDICCIÓN Y DEMOCRACIA: LOS NUEVOS RUMBOS DEL PODER JUDICIAL EN MÉXICO* 107 (2002).

28. Justices enjoyed life tenure until the 1994 reforms. The 1917 constituent assembly discussed the judiciary and sought to enhance its independence in “reaction to the judiciary's [historical] subordi-

PRI ascendancy for two reasons—one political, the other attitudinal. The political explanation lies in bureaucratic recruitment and advancement. Justices were selected among aspiring PRI functionaries with remarkably little media attention or involvement by professional organizations. Justices tended to see their position as a stepping-stone to a better career somewhere higher up the PRI ladder.²⁹ The attitudinal explanation is that judges shared a desire not to undermine the revolutionary project of remaking Mexico.³⁰ The Mexican Constitution of 1917 was designed to be a transformative document,³¹ and judges believed that the political branches were to play the key role in turning the promises contained in the constitution into reality. Mexican constitutional scholars drew negative lessons from the role that the U.S. Supreme Court played in preventing social reforms under *Lochner*³² and its progeny, and concluded that courts with the power of judicial review were an obstacle to social reform.³³ Mexican courts adopted formalism, as have courts in authoritarian regimes throughout the world, to avoid entanglement with politics.³⁴

nation” to strong presidents. Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. LATIN AM. STUD. 705, 711, 713 (2000).

29. *Id.* at 723. Between 1934 and 1994, almost 40% of the Justices remained in office fewer than five years, even though they had life tenure. Beatriz Magaloni, *Authoritarianism, Democracy, and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, in DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA 266, 288–90 (Scott Mainwaring & Christopher Welna eds., 2003). Under the PRI, the judiciary was starved for resources. It was better characterized as “third rate rather than the third branch of government.” Héctor Fix-Fierro, *Judicial Reform in Mexico: What Next?*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 240, 240 (Erik G. Jensen & Thomas C. Heller eds., 2003).

30. See Charles A. Hale, *The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa*, 18 LAW & HIST. REV. 257, 278 (2000).

31. The Mexican Constitution of 1917 was part of a larger project to “regenerate” or modernize Mexico by overcoming the legacies of the past that had prevented it from “developing.” See WILLIAM H. BEEZLEY & COLIN M. MACLACHLIN, 2 EL GRAN PUEBLO: A HISTORY OF GREATER MEXICO 1911–THE PRESENT 245–47 (1994).

32. For a discussion of the role that the fear of *Lochner* (i.e. that courts would undo social reforms adopted by majoritarian institutions) played in the comparative constitutional imagination, see Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 OSGOODE HALL L.J. (forthcoming 2008).

33. See Hale, *supra* note 30. The majority of jurists throughout the period of PRI ascendancy defended the view that the Constitution of 1917 was largely a political instrument. GONZÁLEZ & BAUER, *supra* note 27, at 121. See generally Matthew C. Mirow, *Marbury in Mexico: Judicial Review’s Precocious Southern Migration*, 35 HASTINGS CONST. L.Q. 41 (2007) (examining the history of Mexico’s judiciary in its relation to American jurisprudence).

34. Judges in authoritarian regimes can retain a high degree of independence by relying on legal formalism to reduce or prevent conflict with the other branches. LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE 249 (2007).

This was the legacy faced by Ernesto Zedillo when he became president in 1994. Zedillo ran on a platform that included judicial reform and delivered on that promise almost immediately upon taking office. Zedillo was part of a wing of the PRI that sought to improve the functioning of the judiciary as a means of facilitating economic and political liberalization.³⁵ In addition, rising levels of violence “forced all [the] presidential candidates [in 1994] to make justice-related campaign promises.”³⁶ The speed with which the reforms occurred is remarkable. Zedillo delivered his inaugural speech on December 1, 1994, and spoke at length of the need to strengthen the Supreme Court by reforming the constitution.³⁷ He proposed profound constitutional reforms on December 6, 1994. The reforms became law by February 1, 1995.³⁸ There was little or no discussion of these reforms in Congress, the public, or the media.³⁹

Zedillo’s reform package had two complementary aims.⁴⁰ The first was to

35. The “technocrats” within the PRI, such as Ernesto Zedillo, who favored liberalization were largely trained in disciplines like economics in the United States. *See generally* MIGUEL ÁNGEL CENTENO, *DEMOCRACY WITHIN REASON: TECHNOCRATIC REVOLUTION IN MEXICO* (1999) (analyzing the technocrat revolution in Mexico and its repercussions on the modern state). Reforms aimed at professionalizing the judiciary began in the 1980s, however, and preceded Zedillo’s election. Fix-Fierro, *supra* note 29, at 240–41.

36. Silvia Inclán Oseguera, *Judicial Reform and Democratization: Mexico in the 1990s*, at 88 (2004) (unpublished PhD dissertation, Boston University) (citing 50 PREGUNTAS A LOS CANDIDATOS, ELECCIONES MEXICANAS 21 DE AGOSTO DE 1994, at 135 (Federico Reyes Heróles coord. 1994)).

37. President Ernesto Zedillo, *Discurso Completo de la Toma de Posesión Como Presidente* (Dec. 1, 1994), <http://www.bibliotecas.tv/chiapas/dic94/01dic94a.html>.

38. Amendments require a two-thirds majority in Congress and a simple majority in the states. MEX. CONST. art. 135. The speed with which the judicial reform of 1994 was implemented was not unusual. Article 135 was an ineffective speed bump to a party that controlled all 3 branches of the federal government and the majority of state governments for almost the entire twentieth century. The Mexican Constitution was amended four hundred times between 1917 and 1988, when the PRI lost the ability to amend the Constitution without consulting the other parties. Magaloni, *supra* note 29, at 282. Although constitutions in Latin America are, formally speaking, rigid documents, they are flexible in practice as evidenced by the ease with which they are changed. *See* Schor, *supra* note 5, at 29.

39. The dearth of discussion that the proposed judicial reform generated is remarkable. It “attracted little media attention, occupying no newspaper headlines or front page space.” Oseguera, *supra* note 36, at 89. It generated little or no discussion in Congress, which enacted Zedillo’s initiative in sixteen days. The reform reduced the number of justices from twenty-six to eleven. There was no complaint by the sitting members of the Supreme Court, all of whom lost their positions, as they were offered retirement bonuses. *Id.* at 92. When interviewed, the outgoing president of the Supreme Court stated that the Court would comply with these changes as “only in this manner could Mexico remain governed by the rule of law.” Miguel Cabildo, *Los 25 Ministros Que Serán Jubilados, Sus Historias, Sus Carreras, Sus Nombramientos*, PROCESO, Dec. 19, 1994, at 32. For a more nuanced view on the level of interest generated by the 1994 reforms, *see* Fix-Fierro, *supra* note 29.

40. STEPHEN ZAMORA ET AL., *MEXICAN LAW* 188 (2004).

secure the independence of the Mexican Supreme Court. The 1994 reforms provide that appointees may not have held a political position for one year prior to appointment and may not hold political office for two years after retirement.⁴¹ The executive's appointment power was weakened as well. Following the 1994 reforms, the president must submit three names to the Senate, which then has thirty days to select one by a two-thirds majority vote.⁴²

The second goal of the reforms was to empower the Mexican Supreme Court to deal with vertical and horizontal separation of power issues. Mexico moved towards the political court model of review,⁴³ which is the norm in Europe,⁴⁴ when Article 105 of the Mexican Constitution was amended. A defining characteristic of this model is that political actors may bring their disputes directly to a national high court for resolution. The Mexican version of the political court model provides for two different review mechanisms. One is the *controversia constitucional*, which provides for centralized, *a posteriori* review of "any dispute that may arise between government authorities."⁴⁵ It is designed to effectuate vertical and horizontal separation of powers by enabling the various branches of government to air out their disputes before the Mexican Supreme Court.⁴⁶ The other major innovation is the *acción de inconstitucionalidad*, which is a form of abstract, centralized review.⁴⁷ It is designed to allow political parties to bring claims directly before the Supreme Court.⁴⁸ Decisions under either action are binding *erga omnes* and have, therefore, precedential effect, which is an innovation in Mexican law designed to strengthen judicial rulings of invalidity. Under either form of review, a minimum of eight out of the eleven justices must vote to invalidate a law, which preserves an ample margin of apprecia-

41. MEX. CONST. arts. 95, 101.

42. *Id.* art. 96. If the Senate fails to act, the President can select one of the nominees. If the Senate rejects all three, then the President provides a new list of nominees. If the Senate again rejects all three, the President then can designate an appointee. *Id.*

43. The political court model is defined and compared to other models of judicial review in Schor, *supra* note 32.

44. The political court model of judicial review has proven highly influential throughout Latin America as well. See generally Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189 (2005).

45. ZAMORA, *supra* note 40, at 275. Claims may be brought only before the Mexican Supreme Court. *Id.* at 276. They must also be brought within thirty days of the challenged decision. *Id.* at 280. The 1917 Constitution provided for this form of review as well but it lacked any implementing legislation until the 1994 reforms. *Id.* at 276.

46. *Id.* at 274.

47. See *id.* at 282–85.

48. The actors who have standing are qualified legislative minorities, the Attorney General of Mexico, and the leaders of political parties. *Id.* at 284.

tion for legislatures.⁴⁹ These two reforms provided the Mexican Supreme Court with the requisite tools to become a powerful actor in disputes between the various branches of government and between political parties.

The *writ of amparo*, on the other hand, which is the vehicle used to effectuate individual rights, was not reformed in 1994. Prior to 1994, it was the primary judicial review mechanism in Mexico.⁵⁰ It is frequently criticized for having only *inter pares* effect in what has become known as the Otero formulation.⁵¹ A weak system of precedent has some virtues, however. Civil law systems look askance upon precedent because the code, and not its judicial incrustations, is the law.⁵² Similarly, scholars have argued that precedent should have less strength in constitutional adjudication than in other fields because “a written constitution . . . must provide flexibility if judicial supremacy is to be permitted.”⁵³ The real problem with the *writ of amparo* is that it has become very technical and has “gradually turned into a subtle and intricate tapestry of legal nuances.”⁵⁴ It can be used to challenge judicial decisions and is frequently used to delay and clog up judicial proceedings.⁵⁵

Following the 1994 constitutional reforms, the Mexican Supreme Court became an important player in Mexican politics. The reforms changed the “political understanding surrounding the Supreme Court’s role as a check on the separation

49. Some scholars have criticized the supermajority provision as weakening judicial control of legislation. See, e.g., Jodi Finkel, *Judicial Reform as an Insurance Policy: Mexico in the 1990s*, 46 *LATIN AM. POL. & SOC’Y* 87, 97 (2004). It has the virtue, however, of institutionalizing the principle, first articulated by Thayer, that courts should invalidate legislation only when a clear mistake has been made. See generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129 (1893). The Mexican supermajority rule fits in comfortably with a trend toward limiting the power of courts to invalidate legislation, which Mark Tushnet calls weak-form review. TUSHNET, *supra* note 17, at 18–42.

50. Héctor Fix-Zamudio & Eduardo Ferrer Mac-Gregor, *El Derecho de Amparo en México*, in *EL DERECHO DE AMPARO EN EL MUNDO* 461 (Héctor Fix-Zamudio & Eduardo Ferrer Mac-Gregor eds., 2006).

51. *Id.* at 5 14–21.

52. See generally JOHN MERRYMAN ET AL., *THE CIVIL LAW TRADITION* 937–1011 (1994) (describing sources of law and philosophies of judicial interpretation, including the role of precedent, in civil law systems).

53. EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 42 (1st ed. 1949).

54. ZAMORA, *supra* note 40, at 259. Repeated efforts to reform the *writ of amparo* have failed for lack of political support. *Id.* at 260–61; Domingo, *supra* note 28, at 717–18. In 1992 around “77 percent of *amparo* cases were dismissed for reasons of improper procedure” and only 11% favored the plaintiff. Domingo, *supra* note 28, at 717.

55. Zamora concludes that it is “often simply used as a delaying tactic in civil disputes that have little to do with constitutional guarantees.” ZAMORA, *supra* note 40, at 274.

of powers.”⁵⁶ Disputes that were once ignored or handled behind closed doors by the president are now resolved by the court. This transformation can be seen most readily in a number of recent cases involving the president.⁵⁷ It would have been unthinkable for the Mexican Supreme Court to have resolved these disputes before the 1994 reforms. One such dispute involved a suit filed by opposition lawmakers seeking information regarding the “questionable financing of Mr. Zedillo’s 1994 campaign.”⁵⁸ Another involved a dispute between President Vicente Fox and Congress over an attempt by the President to limit the budget in 2005. The Mexican Supreme Court upheld Fox’s actions but provided a mechanism by which Congress could reject presidential changes to the budget.⁵⁹ Another important case occurred when the court ruled that a former president could be tried for crimes committed in office.⁶⁰ The striking aspect of these three cases is that the Mexican Supreme Court assumed an important role as an umpire in disputes between the different branches of government. The Mexican Supreme Court has not been as active as the Colombian Constitutional Court, however, in effectuating individual rights.

II. A NEW DEMOCRATIC ACTOR IN COLOMBIAN POLITICS

While Mexico had a stable, open, authoritarian regime throughout the twentieth century, Colombia experienced a stable, closed democracy. It had regular presidential elections throughout the twentieth century with one short dictatorial interruption.⁶¹ Against this electoral success, however, one must weigh the obvious deficiencies of Colombian democracy such as marked inequality; a “horrendous spiral of violence,” particularly “[s]ince the mid-1980s”; and the “inability or unwillingness” of political institutions “to respond adequately to . . . dramatic socioeconomic

56. Finkel, *supra* note 49, at 92–93.

57. This essay focuses on horizontal, rather than vertical, separation of powers. For an analysis of vertical separation of powers, see generally Susana Berruecos, *El Nuevo Papel del Poder Judicial en México: La Corte Suprema Bajo un Nuevo Federalismo*, in *ESTADO DE CRISIS O CRISIS DEL ESTADO* 77–108 (Beatriz Londoño Toro ed., 2003).

58. Sam Dillon, *Mexico Court Makes History by Siding with Congress*, N.Y. TIMES, Aug. 25, 2000, at A3. Justice Olga Sanchez Cordera stated in a news conference that “this was a profoundly historic decision.” *Id.*

59. Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidencialismo*, 4 INT’L J. CONST. L. 411, 422 (2006).

60. *Id.*

61. FRANK SAFFORD & MARCO PALACIOS, *COLOMBIA: FRAGMENTED LAND, DIVIDED SOCIETY* 298 (2001).

changes . . .”⁶² In response to the violence and immobilism of the political system, the power of Colombian presidents grew through the repeated use of states of emergency.⁶³ In short, in a region of troubled democracies, Colombia stands out for its combination of elections, overly powerful presidents, inequality, and violence.

The latter half of the twentieth century witnessed a profound constitutional moment throughout the Americas.⁶⁴ No country in the Americas experienced as profound a constitutional transformation, however, as Colombia. It was also a transformation marked by illegality, though this may be the norm with regard to deep constitutional changes.⁶⁵ A referendum was used to determine whether the voters desired a constitutional assembly, despite the fact that only Congress had the power to amend the constitution.⁶⁶ The barrier to amendment was quite low, since amendments required only an absolute majority in both houses of Congress in two consecutive sessions.⁶⁷ Although Colombia's Constitution was formally flexible, it proved rigid in practice. Colombia's democracy had become increasingly dysfunctional in the second half of the twentieth century. Its presidents, elected by a nationwide con-

62. Jonathan Hartlyn & John Dugas, *Colombia: The Politics of Violence and Democratic Transformation*, in *DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA* 249, 249–50 (Larry Diamond et al. eds., 2d ed. 1999).

63. *Id.* at 251 (noting that the country has largely been governed under a state of siege since the 1940s); see also Ronald P. Archer & Matthew Soberg Shugart, *The Unrealized Potential of Presidential Dominance in Colombia*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA*, *supra* note 25, at 110, 126 (noting that Colombia was under a state of siege 75% of the time from 1958 to 1991). States of siege have been a leitmotif of Latin American politics. As a consequence, constitutionalism in the region facilitated dictatorship as the exception becoming the rule. See generally LOVEMAN, *supra* note 4.

64. The constitutional changes in Latin America were dramatic. SMITH, *supra* note 4, at 156 (“During the 1990s, seven countries adopted completely new constitutions; others used amendments as a means of reform.”); Oquendo, *supra* note 8, at 192. Canada adopted the Charter of Rights and Freedoms after a long and difficult gestation. See PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE* 4 (3d ed. 2004). The United States was not immune to the wave of constitutional democratization, but that transformation occurred via the Supreme Court rather than formal amendment. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 2 (2000) (arguing that the Warren Court was part of a larger liberal coalition that mounted a sustained assault on anti-democratic enclaves found primarily in the South).

65. In the United States, for example, “the Constitutional Convention was acting illegally in proposing its new document in the name of We the People.” BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 41–42 (1991).

66. The legality of the convention was tested in the Colombian Supreme Court, which upheld the referendum “on the grounds that the state of siege powers permitted the president in times of ‘abnormality’ to respond to the ‘primary constituency.’” Archer & Shugart, *supra* note 63, at 147.

67. Daniel L. Nielson & Matthew Soberg Shugart, *Constitutional Change in Colombia: Policy Adjustment Through Institutional Reform*, 32 *COMP. POL. STUD.* 313, 321 (1999).

stituency, reflected the desires of urban voters in seeking institutional change.⁶⁸ These desires were blocked by a Congress that suffered from malapportionment and therefore reflected the desires of rural rather than urban voters.⁶⁹

While the legality of Colombia's constitutional assembly was questionable, it was undoubtedly democratic. President Virgilio Barco used his state of siege powers to hold a referendum on whether Colombia should have a constituent assembly.⁷⁰ Students and leading newspapers advocated in favor of a new constitution to deal with Colombia's myriad problems.⁷¹ The referendum, which was held in conjunction with the May 1990 presidential election, passed with 88 percent of the vote.⁷² The members of the constituent assembly were subsequently elected by a minority of Colombia's voters⁷³ but represented a broad swathe of the political forces of the nation. The low turnout "enabled nontraditional parties and movements to do extraordinarily well."⁷⁴ In addition to representatives of the major parties, the assembly included significant representation from demobilized guerrillas as well as indigenous and religious minorities. No group dominated the assembly, which meant that decisions were reached on the basis of broad "discussion and consensus."⁷⁵

The 1991 Constitution addressed Colombia's democratic deficits: a system of representation that had done a poor job of aggregating voter preferences; an overly

68. *Id.* (noting that the "history of Colombia" between 1974 and 1990 is replete with "failed attempts to reform the constitution").

69. *Id.* at 319 (observing that "by 1986, more than half the members of Congress were elected primarily by rural voters, even though more than 60% of the population was urban").

70. *Id.* at 326.

71. JAIME BUENAHORA FEBRES-CORDERO, *EL PROCESO CONSTITUYENTE: DE LA PROPUESTA ESTUDIANTIL A LA QUIEBRA DEL BIPARTIDISMO* 126–28 (1991).

72. JOHN D. MARTZ, *THE POLITICS OF CLIENTELISM: DEMOCRACY & THE STATE IN COLOMBIA* 261 (1997); Nielson & Shugart, *supra* note 67, at 326.

73. SAFFORD & PALACIOS, *supra* note 61, at 336 (noting that 74% of the electorate refrained from voting in the election of delegates to the assembly); Hartlyn & Dugas, *supra* note 62, at 281.

74. Hartlyn & Dugas, *supra* note 62, at 281; Gabriel Murillo-Castaño & Victoria Gómez-Segura, *Institutions and Citizens in Colombia: The Changing Nature of a Difficult Relationship*, 84 *SOC. FORCES* (SUPP.) 1, 3 (2005), http://muse.jhu.edu/journals/social_forces/v084/84.1briceno-leon.pdf (noting that the convention was broadly representative of the main social forces in Colombia); Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, 10 *DEMOCRATIZATION* 46, 52 (2003) ("[O]ver 40 percent of the members of the Constituent Assembly did not belong to the Liberal and Conservative parties, which had until then dominated Colombian electoral politics.").

75. Uprimny, *supra* note 74, at 52.

powerful president; and a broad failure to effectuate individual rights.⁷⁶ Referenda were introduced to reinvigorate electoral democracy.⁷⁷ The power of the president to legislate and declare states of siege was weakened.⁷⁸ The new constitution was rich in rights and in judicial mechanisms for their protection.⁷⁹

The 1991 Constitution also created a new constitutional watch guard—the Colombian Constitutional Court—to replace the Supreme Court as the final arbiter of constitutional meaning. The constituent assembly vigorously debated whether a new court was needed.⁸⁰ Forces who feared that it “would give judicial decisions too much importance as sources of law,” as in the United States, opposed the creation of a constitutional court.⁸¹ The proponents of the new court, on the other hand, believed that the Colombian Supreme Court had interpreted the 1886 Constitution in a formal manner that undermined rights protection and “amplified the distance between the Constitution and the socio-political life of the [Colombian] nation.”⁸² Somewhat surprisingly, the new Constitutional Court became a powerful guardian of constitutional rights. Constitution drafters, after all, do not know *ex ante* how the institutions they craft will behave. There are three important characteristics of the Colombian Constitutional Court that helped it emerge as a powerful protector of rights for groups marginalized from political power: a new method of judicial appointment; a new mechanism of judicial review; and a transformation in how rights are conceptualized.

First, appointments link courts to broader political forces, thereby playing a key

76. See Manuel José Cepeda-Espinosa, *Democracy, State and Society in the 1991 Constitution: The Role of the Constitutional Court*, in COLOMBIA: THE POLITICS OF REFORMING THE STATE 72–73 (Eduardo Posada-Carbó ed., 1998); John C. Dugas, *Explaining Democratic Reform in Colombia: The Origins of the 1991 Constitution* 84–85 (1997) (unpublished PhD dissertation, Indiana University), <http://proquest.umi.com/pqdweb?did=739796131&sid=1&Fmt=2&clientId=12010&RQT=309&VName=PQD>.

77. There were also significant reforms to the electoral system, and new elected positions were created. Dugas, *supra* note 76, at 87. While only Congress could amend the 1886 Constitution, the 1991 Constitution also provides for change by a popularly elected constituent assembly. *Id.*; CONSTITUCIÓN POLITICA DE COLOMBIA arts. 260, 376 (1991) [hereinafter COLOM. CONST.].

78. The Colombian Constitutional Court has actively policed and restricted presidential declarations of a state of siege, facilitating a striking reduction in its use. In the 1980s, Colombia was in a state of siege for 80% of the time, in the 1990s, only 20%. Uprimny, *supra* note 74, at 64–65.

79. Although the 1991 Constitution clearly strengthened the mechanisms of judicial review, there is a long tradition of judicial review in Colombia, as this power was established in the 1886 Constitution. MANUEL JOSÉ CEPEDA-ESPINOSA, *POLÉMICAS CONSTITUCIONALES* 6 (2007).

80. Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 547 (2004).

81. *Id.* at 549.

82. CEPEDA-ESPINOSA, *supra* note 79, at 33.

role in the construction of judicial accountability. Scholars overly emphasize judicial independence as the key to making constitutions work, whereas the problem is better conceptualized as one of accountability. For courts to play a useful role in effectuating constitutional democracy, they must be somewhat, but not overly, accountable. Courts that are overly accountable to political factions erode the trust needed for democracy to work,⁸³ whereas overly independent courts have little incentive to play a positive role in the construction of democracy.⁸⁴ The Colombian Supreme Court, for example, was insufficiently accountable under the 1886 Constitution. The court “nominated its own new members” and, not surprisingly, had little incentive to play a constructive role in democratic politics.⁸⁵ The 1991 Constitution, on the other hand, created an appointments mechanism that made the Constitutional Court broadly representative of the political forces of the nation. The court currently has nine members who are elected by the Senate for one eight-year period.⁸⁶

Second, unlike the 1994 Mexican constitutional reform that empowered political actors to bring claims directly before the Mexican Supreme Court, the 1991 Colombian reforms created a new tool by which ordinary citizens could vindicate rights.⁸⁷ The *writ of tutela* allows any person whose fundamental rights⁸⁸ are threatened to sue. These actions are informal and may be filed without an attorney. Judges must give these actions priority and reach a decision within ten days. The Colombian Constitutional Court has discretion to review these decisions.⁸⁹ The bulk of the work of the Constitutional Court deals with reviewing *tutela* ac-

83. Schor, *supra* note 32.

84. HILBINK, *supra* note 34, at 241 (arguing that the independence of the Chilean judiciary fostered an extreme legalism that undermined democracy).

85. Cepeda-Espinosa, *supra* note 80, at 540.

86. *Id.* at 551. The Supreme Court, the Council of State, and the President each submit lists of three candidates. COLOM. CONST. arts. 239–40.

87. Abstract mechanisms of judicial review, which had their origin in the 1886 Constitution, were also strengthened. Cepeda-Espinosa, *supra* note 80, at 554–56. The 1991 Constitution also introduced mechanisms to contextualize abstract review by authorizing the Constitutional Court to hold “public hearings to gather information on the socio-political context of the matter at hand.” *Id.* at 556. Abstract review generally has *erga omnes* effect, whereas *tutela* decisions generally have *inter pares* effect. *Id.* at 565, 571.

88. The formal catalogue of fundamental rights is found in Title II, Chapter I of the 1991 Constitution. The court has, however, given an expansive reading to the term “fundamental rights.” Rights not found in Title II, Chapter I, such as economic, social, and cultural rights, may also be deemed fundamental. ESTADO SOCIAL DE DERECHO/JUEZ DE TUTELA, Corte Constitucional [Constitutional Court], Sentencia No. T-406/92 (Colom.); Mauricio García-Villegas, *Law as Hope: Constitutions, Courts, and Social Change in Latin America*, 16 FLA. J. INT’L L. 133, 145 (2004).

89. COLOM. CONST. art. 86; Cepeda-Espinosa, *supra* note 80, at 552–54.

tions, which have grown dramatically in importance since 1991.⁹⁰ Scholars dispute the relative merits of abstract, concentrated review versus concrete, diffuse review. It has been argued, for example, that a specialized tribunal exercising abstract, concentrated review is more likely to become a vigorous defender of a constitution than is a non-specialized court exercising concrete, diffuse review.⁹¹ The problem with this view is that the formal mechanisms of judicial review do not determine the role that a court assumes in a given democratic order. To understand the emergence of courts as institutions, scholars need to contextualize the work of courts. Diffuse review does have a democratic pay-off that concentrated review does not—empowering citizens to bring claims may help build a constituency for the legal system. The sheer number of *tutela* actions filed in Colombia attests to the emergence of a culture of rights.⁹² Courts are powerless unless other actors use their decisions as a form of coinage in political struggles.⁹³ The lack of a constituency means that the law neither regulates, nor ameliorates, political conflict because the “linkages between law and society are broken.”⁹⁴ The existence of a constituency, on the other hand, amplifies the power of courts⁹⁵ and helps active courts, such as the Colombian Constitutional Court, weather the political storms that their decisions inevitably engender.⁹⁶

Third, the 1991 Constitution marks a crucial transformation in how rights are conceptualized in Colombia. The Colombian Constitutional Court has displaced elected officials as the principal guardian of rights. In contrast, under the 1886 Constitution, courts were clearly subservient to the legislature in effectuating rights; the liberties that the Constitution provided “were understood to be simple prerogatives given by the state to individuals,” which lacked enforcement mecha-

90. In 1992, the Colombian Constitutional Court reviewed 8,060 *tutela* decisions; in 2001, the number was 133,273. From 1992 to 2002, the total number of decisions decided by the Court increased from 235 to 1,123. Around 70% of those are *tutela* decisions; the rest are abstract review. Cepeda-Espinosa, *supra* note 80, at 559–62.

91. AREND LJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 223–38 (1999).

92. CEPEDA-ESPINOSA, *supra* note 79, at 95–117.

93. SCHOR, *supra* note 3, at 1331–32.

94. *Id.* at 1333. See generally JENNIFER A. WIDNER, BUILDING THE RULE OF LAW (2001).

95. Even courts in authoritarian regimes have surprising reservoirs of strength if they have a political constituency. See, e.g., TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 17 (2007).

96. Rodrigo Uprimny & Mauricio García-Villegas, *The Constitutional Court and Social Emancipation in Colombia*, in DEMOCRATIZING DEMOCRACY: BEYOND THE LIBERAL DEMOCRATIC CANON 66, 74 (Boaventura de Sousa Santos ed., 2005); see, e.g., Uprimny, *supra* note 74, at 59.

nisms and could be broadly restricted.⁹⁷ The judiciary consequently read the 1886 Constitution in a formal manner that effectively marginalized courts from the political problems of the nation.⁹⁸ The framers of the 1991 Constitution attacked this problem, in part by providing a much richer set of rights than those found in the 1886 Constitution.⁹⁹ The long catalog of rights does not negate the existence of other unenumerated rights,¹⁰⁰ and the vast majority of classical negative rights may be applied directly by courts.¹⁰¹

More importantly, the Colombian Constitutional Court abandoned formalism and adopted a realist approach that emphasized balancing tests. The change was sudden and “unexpected” in a country that had a four century-old tradition of “legal culture” wrapped in “ritual forms.”¹⁰² The “traditionalist Latin American view that minimizes the role of constitutions by focusing on concrete rules” has been replaced by a “newer view that focuses on the principles and values behind constitutions, and thus tends to read them broadly.”¹⁰³

This transformation did not flow simply from the rights inscribed in the 1991 Constitution or from the fact that they were made directly applicable by courts. The membership of the Colombian Constitutional Court is quite different from that of its predecessor, the Colombian Supreme Court. The new court has a large number of former academics. A number of important politicians believed that legal academics were more likely to have attitudes “in accord with a progressive, new-constitutional political agenda.”¹⁰⁴ These new judges had an international outlook and understood that the dominant approach around the globe in construing constitutions involved balancing.

Courts around the globe made the shift away from formalism and toward balancing and pragmatism as they began to actively effectuate rights. The agenda of the U.S. Supreme Court changed in the twentieth century as it turned increasingly to rights litigation.¹⁰⁵ In the late nineteenth and early twentieth centuries, the

97. Cepeda-Espinosa, *supra* note 80, at 575.

98. CEPEDA-ESPINOSA, *supra* note 79, at 33.

99. Articles 11–41 of the Colombian Constitution provide a list of classical negative or “fundamental rights.” Articles 42–77 catalog economic, social, and cultural rights. Articles 78–82 list collective and environmental rights. COLOM. CONST. arts. 11–82.

100. *Id.* art. 94.

101. *Id.* art. 85.

102. Cepeda-Espinosa, *supra* note 80, at 651.

103. David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 GEO. WASH. INT’L L. REV. 687, 689 (2005).

104. *Id.* at 725.

105. See generally EPP, *supra* note 15.

Court came under attack for preventing social reforms by relying on what critics argued was an outmoded view of the Constitution.¹⁰⁶ In response, justices such as Holmes, Brandeis, and Stone championed a realist turn that utilized balancing to take social facts into account in constitutional adjudication.¹⁰⁷ The Court explicitly began to rely on balancing tests in the late 1930s and 1940s as it articulated a new role within American politics.¹⁰⁸ An analogous transformation occurred in Canada. Canada's original constitution, the British North America Act of 1867, established federalism but did not constitutionalize rights.¹⁰⁹ Canadian courts relied on legal formalism when judicial review encompassed only federalism.¹¹⁰ Rights were constitutionalized in 1982 with the adoption of the Canadian Charter of Rights and Freedoms.¹¹¹ When faced with the task of construing an expansive list of rights, Canadian courts turned to balancing. This process was accelerated by the appointment of academics, such as Bora Laskin, to the Canadian Supreme Court.¹¹² This shift in legal reasoning was preceded by a transformation in Canada's legal culture that involved a vigorous debate over the roots of Canadian constitutionalism and the desirability of enhancing the role of courts.¹¹³ The most important piece in the puzzle of the spread of balancing, however, was the adoption of proportionality¹¹⁴ by the German Constitutional Court after World War

106. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 148–93 (1993).

107. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 954–56 (1987).

108. *Id.* at 948.

109. RUSSELL, *supra* note 64, at 15–31.

110. Peter Hogg, *Canada: From Privy Council to Supreme Court*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* 55 (Jeffrey Goldsworthy ed., 2006); *see also* Jennifer Smith, *The Origins of Judicial Review in Canada*, 16 CAN. J. POL. SCI. 115 (1983) (discussing the intellectual origins of judicial review in Canada).

111. EDWARD McWHINNEY, *CANADA AND THE CONSTITUTION 1979–1982: PATRIATION AND THE CHARTER OF RIGHTS* (1982).

112. Hogg, *supra* note 110, at 77–80.

113. RUSSELL, *supra* note 64, at 99–125; David Oliver Erdos, *Mace, Sword, and Scales: The Bill of Rights Debate in Westminster Democracies* (2007) (unpublished dissertation, Princeton University, on file with the author).

114. Scholars in the United States tend to speak of balancing, whereas scholars abroad speak of proportionality. See Jacco Bomhoff, *Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law*, 31 HASTINGS INT'L & COMP. L. REV. 555 (2008), for an analysis of this distinction.

II.¹¹⁵ From Germany, balancing spread “relatively quickly from one jurisdiction to another” in an almost “viral” fashion.¹¹⁶

This transformation of legal culture¹¹⁷ has been more wrenching in Latin America than elsewhere in the Atlantic world because formalism developed deep roots during the long ascendancy of oligarchy and dictatorship in the region. Colombia is at the vanguard of this shift in legal consciousness in Latin America, which is linked, as it is elsewhere around the globe, to the notion of justiciable rights.¹¹⁸ The 1886 Constitution was conceived as regulating the “functions and competencies of the branches of government” but not as a source of rights that “citizens could judicially enforce.”¹¹⁹ Criticisms of the classical understanding of constitutionalism emerged as part of a larger conversation about the state’s failure to deal with Colombia’s deep problems. Dworkin and his expansive view of the role of courts in effectuating rights displaced Kelsen’s narrower views in the legal imagination. This shift in legal culture is reflected in the work of the Colombian Constitutional Court, as the justices “have made frequent use of contemporary legal theory to fashion a new judicial style in open contrast with the classical style.”¹²⁰ The Court has used this new style of legal reasoning to fashion a progressive jurisprudence that has both provided outputs for groups long marginalized

115. See generally Sweet & Mathews, *supra* note 20, at 16–27 (tracing “the emergence of [proportionality analysis] as a formal procedure for dealing with rights claims” in Germany).

116. *Id.* at 26.

117. Professor Diego Eduardo López-Medina provides a seminal study of this transformation. DIEGO EDUARDO LÓPEZ-MEDINA, *TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURIDICAL LATINOAMERICANA* (2005).

118. The Mexican Supreme Court recently began to utilize balancing tests in *amparo* cases. Luisa Conesa, *The Tropicalization of Proportionality Balancing: The Colombian and Mexican Examples* (Cornell Law Sch. LLM Paper Series, Paper No. 13, 2008) available at <http://lsr.nellco.org/cornell/lps/clacp/13>. It is not surprising that balancing in Mexico emerged first in *amparo* cases because it is designed, *inter alia*, to effectuate individual rights. The transformation in Mexico appears incomplete, however, as some scholars characterize the reasoning of the Court in many cases as “formalistic.” See GONZÁLEZ & BAUER, *supra* note 27, at 34; see also Sergio López-Ayllón & Héctor Fix-Fierro, “Faraway, So Close!” *The Rule of Law and Legal Change in Mexico, 1970–2000*, in *LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE* 285, 286 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003) (noting that factors facilitating the rule of law such as a “stronger judiciary, and increasing rights awareness among the population” are counterbalanced by, among other things, a “formalistic judicial mentality”).

119. LÓPEZ-MEDINA, *supra* note 117, at 408.

120. *Id.* at 436.

from political power and deepened the social bases of democracy in a society long marked by inequality.¹²¹

CONCLUSION

Mexico and Colombia provide an instructive unit of comparison politically and juridically. Throughout the twentieth century, Mexico was a remarkably open authoritarian regime and Colombia a fairly closed electoral democracy. Today, both nations are vigorous, if troubled, democracies. Both nations adopted important reforms in the 1990s that empowered their respective national high courts to enforce constitutional guarantees. While both Mexico's and Colombia's constitutional moments were marked by authoritarian undertones, the adoption of Colombia's 1991 Constitution clearly involved a higher degree of discussion and participation than Mexico's 1994 constitutional reforms.

Both Mexico and Colombia strengthened their mechanisms of judicial review, which in turn is part of a world-wide process that scholars call the judicialization of politics.¹²² The term "judicialization of politics" is problematic, though, as it focuses attention on why courts gain power while obscuring the transformations occurring within the judiciary. Scholars have paid too much attention to the conditions that facilitate the emergence of judicial power and too little on what courts are actually doing. Courts are transformed when they exercise judicial review.¹²³ When courts assume the job of judicial review in a new democracy, they may become institutions whose members believe they have an important role to play in keeping the democratic enterprise afloat. For example, the uncertainty as to the role of the Supreme Court in the early American republic, and the political disagreement its work engendered, helped forge the Marshall Court into a remarkably unified institution.¹²⁴ Similarly, both Mexico and Colombia have powerful national high courts whose members share a mission or a belief that they are

121. See Cepeda-Espinosa, *supra* note 80, at 650, 665; García-Villegas, *supra* note 88, at 141. *But see* García-Villegas, *supra* note 88, at 151. See generally Uprimny & García-Villegas, *supra* note 96, at 65–92 (examining the role of progressive constitutions in "social emancipation," with particular emphasis on Colombia).

122. See generally THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 19.

123. See Grey, *supra* note 21, for a richly suggestive essay on this point.

124. See DWIGHT WILEY JESSUP, REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICT 1809–1835, at 445–47 (1987).

engaged in a common enterprise.¹²⁵ The notion that courts should be subservient to political actors has been swept away. This is an important transformation in a region where politicized constitutions have long facilitated dictatorship.

One of the lessons of this essay is that the two courts have different notions of what their jobs should be. The Mexican Supreme Court sees its role as an umpire in the game of politics. It maintains horizontal and vertical separation of powers and prevents parties from riding roughshod over each other. It bears a familial relationship to the Marshall Court in the early American republic, which assumed the job of maintaining the shifting line between nation and state. The Colombian Constitutional Court, on the other hand, clearly plays a different role. In a country marked by violence and inequality, it sees its role as deepening the social bases of democracy. It has breathed life into the long list of rights contained in Colombia's 1991 Constitution and the citizens of that nation have increasingly turned to the Court for protection. It bears a familial relationship to the Warren Court, which sought to deepen American democracy and enforce rights against a recalcitrant minority located mainly in the South.

The issue is why these two courts assumed such different missions. The obvious answer focuses on the short-term political bargains that empowered these two courts. Mexico chose to strengthen the mechanisms by which political actors could bring claims directly before the Supreme Court, whereas Colombia created a tool by which ordinary citizens could bring claims before its courts. The problem with this view is that courts are not automatons whose job can be engineered *ex ante* by constitution makers. Both the Mexican Supreme Court and the Colombian Constitutional Court could have ignored or perverted the mandates that were thrust upon them, much as the U.S. Supreme Court did with the reconstruction amendments for more than a century. To answer this question, we need to understand the intellectual atmosphere in which the courts operated. The 1991 constitutional transition in Colombia was preceded by a vigorous public debate over the necessity of enhanced judicial protection of rights and a debate among legal scholars over the role of balancing tests in constitutional law. Mexico, on the other hand, undertook a more limited constitutional revision that was not accompanied by a sustained public debate.

In addition to exploring the constitutional transformations that occurred in

125. See generally Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 65, 78–86 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing the beliefs of the United States Supreme Court justices in regard to the institutional “mission” of the Court).

Mexico and Colombia, this essay also explored the democratic consequences of the different roles assumed by these two courts. An important strand in modern American constitutional theory suggests that the role exercised by Mexico's Supreme Court may be more democratically appropriate than the one exercised by Colombia's Constitutional Court. Both the Marshall and Warren Courts engendered political conflict, but the latter facilitated the rise of a powerful conservative backlash which transformed American politics.¹²⁶ The lesson of the American experience seems to be that courts enhance democracy by enforcing procedural protections but can undermine it by vigorously enforcing substantive protections. Elected officials, not courts, should usher in democratic transformations.

It would appear, moreover, that if activist courts are dangerous in well-established democracies such as the United States, then they are even more dangerous in transitional democracies. This is a mistake for two reasons. First, transitional democracies suffer from a number of democratic deficits. Using the law as a means of addressing these deficits has proven alluring to lawyers throughout Latin America, particularly those who were steeped in the progressive legacy of the Warren Court when they studied in American law schools.¹²⁷ Long, detailed constitutions and activist courts may do a better job of delivering democratic outputs than elected officials.¹²⁸ Precisely because national high courts have a small membership and face different incentives than do legislative bodies, courts may, under appropriate circumstances, forge a collective understanding that their job is to effectuate programmatic constitutions. Second, there is an unexpected but important pay-off to the active enforcement of rights by courts in transitional democracies. Courts can utilize formalism in enforcing separation of powers, but formalism breaks down when they actively effectuate rights. Courts that effectuate rights necessarily balance constitutional guaranties against statutes. Courts provide better democratic outputs when they take a pragmatic, flexible approach, rather than a formal approach, to interpreting constitutional guaranties.

126. Professors Post and Siegel coined the term "backlash thesis." Post & Siegel, *supra* note 16, at 373.

127. Javier A. Couso, *The Seduction of Judicially Triggered Social Transformation: The Impact of the Warren Court in Latin America*, in EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 237, 262 (Harry N. Scheiber ed., 2007).

128. Scheppele, *supra* note 17, at 25.